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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION, THE RUBBER MANUFACTURERS ASSOCIATION, ANHEUSER-BUSCH COMPANIES, INC., BAXTER HEALTHCARE CORPORATION, MOTOROLA INC., AND RINGLING BROS. AND BARNUM & BAILEY COMBINED SHOWS, INC. IN SUPPORT OF RESPONDENT

This brief is respectfully submitted on behalf of the National-American Wholesale Grocers' Association ("NAWGA"), the Rubber Manufacturers Association ("RMA"), Anheuser-Busch Companies, Inc., Baxter Healthcare Corporation, Motorola Inc., and Ringling Bros. and Barnum & Bailey Combined Shows, Inc., as *amici curiae*. Pursuant to Rule 37.3 of the Rules

of this Court, *amici* have obtained and filed the written consent of each of the parties to the filing of this brief. The *amici* support the position of respondent in this case and urge affirmance of the decision below.

INTEREST OF AMICI CURIAE

NAWGA is a national trade association comprised of food distribution companies which primarily supply and service independent grocers and foodservice operations throughout the United States and Canada. NAWGA's 350 members operate over 1,300 distribution centers nationwide with a combined annual sales volume in excess of $85 billion. RMA is a national trade association representing approximately 200 rubber and tire manufacturers. RMA members produce an estimated 40,000 different rubber products, and account for 90 percent of all rubber production in the United States.

Anheuser-Busch Companies, Inc. is a holding company whose subsidiaries include Anheuser Busch, Inc., a brewer, and other companies engaged in such diverse activities as real estate, major league baseball, and container manufacturing. Baxter Healthcare Corporation develops, manufactures, and distributes health care products, systems, and related services for use principally by hospitals, blood and dialysis centers, laboratories, nursing homes, and physicians. Motorola Inc. produces electronic equipment, systems, and components, including two-way radios, pagers, cellular telephone systems, defense and aerospace electronics systems, and data communications and information systems. Ringling Brothers and Barnum & Bailey Combined Shows, Inc. produces and presents

live entertainment, including ice shows and circuses, throughout the world.

The diversity and scope of their operations require that *amici*—including the NAWGA and RMA members—ship a wide variety of products throughout the nation. These shipments consist of finished manufactured goods, as well as raw materials, supplies, and equipment inbound to *amici's* production and manufacturing locations. Because *amici's* production sites are, for the most part, not served by railroads, and since rail transit times are generally not suited to their operations in any event, the preponderance of *amici's* traffic is transported by for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC" or "Commission").

In recent years, many motor carriers, in an attempt to either obtain or retain *amici's* traffic, have quoted rates for the transportation of that traffic at levels below those published in the carriers' tariffs on file with the ICC; the understanding was that the rates the carriers quoted and negotiated would be published by the carriers before they transported any freight thereunder. However, the rates frequently were not published, even though the carriers transported *amici's* traffic over a continuing period of time, billed *amici* at the quoted rates, and accepted payment from *amici* at those rates. Because of the carriers' failure to publish the negotiated rates in their tariffs, *amici* have been subjected to numerous lawsuits seeking recovery of freight undercharges equal to the difference between the negotiated rates that had been quoted by the carriers and paid by *amici*, but not filed, and the carriers' higher filed rates. *Amici* have responded to these suits, which have been brought for the most

part by the carriers' representatives in bankruptcy, by asserting that collection of the filed rates would, under all the circumstances, be an unreasonable carrier practice in violation of the Interstate Commerce Act ("Act").

The issue presented in this case is whether a motor carrier has the right to collect the rates in its filed tariffs when to do so would violate the Act; that issue is the same one raised in the undercharge suits filed against *amici*. In addition, as substantial users of motor carrier service, the issues presented herein are of great importance to *amici* generally. They have, therefore, a compelling interest in the Court's resolution of this proceeding.

SUMMARY OF ARGUMENT

Both the district court and a unanimous panel of the court of appeals concluded in this proceeding that the ICC has exclusive authority to decide if the collection of a motor carrier's filed rate should be barred when such collection would, under all the circumstances, violate the Act. These decisions fully comport with this Court's precedent, as well as with the Act and decisions of the lower federal courts.

The filed rate doctrine, which requires carriers to charge only those rates contained in filed tariffs, does not override the ICC's power to prevent the collection of a filed rate. This Court has held that filed rates must be reasonable. If the ICC concludes that they are not, the filed rates may not be imposed. Because a carrier's rates and the practices relating thereto must be reasonable, it is equally apparent that, in an

action by a carrier to collect its filed rates, a shipper may assert a defense that such collection would violate the Act.

The ICC's power to prohibit the collection of filed rates, when such collection would violate the Act, is exclusive and plenary. The Act and this Court's decisions confer upon the Commission the sole responsibility to decide whether motor carrier rates and practices are reasonable, and the right to fashion appropriate remedies for any rates and practices it finds are not. In view of the ICC's exclusive regulatory authority over motor carriers, the court below properly found that the doctrine of primary jurisdiction required referral to that agency of the issues here involved.

ARGUMENT

The ICC Has Exclusive And Plenary Authority To Find That A Motor Carrier Subject To Its Jurisdiction May Not Collect Its Filed Rates When Such Collection Would Be Unreasonable And Thereby Violate The Act

A. The Filed Rate Doctrine Is Not Absolute And Does Not Bar An ICC Finding That A Filed Rate Or Its Collection Is Unreasonable

The court below held, *inter alia*, that the filed rate doctrine found in Section 10761(a) of the Act, 49 U.S.C. § 10761(a)[1], did not prevent the ICC from finding that petitioner Quinn Freight Lines, Inc. ("Quinn") could not collect its published tariff rates from respondent Primary Steel, Inc. ("Primary"). *Maislin Industries and U.S. Inc. v. Primary Steel, Inc.*, 879

[1] Under Section 10761(a), a motor carrier's rates must be contained in a tariff on file with the ICC, and the carrier can only charge those rates.

F.2d 400, 404-406 (8th Cir. 1989) (Pet. App. 1a).[2] The court noted that Section 10761(a) is only one part of the statute. It is not to be elevated over Section 10701(a), 49 U.S.C. § 10701(a), which requires that motor carrier rates and practices be reasonable; any conflict between these sections is to be reconciled by the ICC. *Id.* at 405.

In urging reversal of this decision, petitioners claim[3] that since the filed rate doctrine requires carriers to collect only their filed rates, the ICC may never permit a shipper to assert a defense to such collection. (Brief For The Petitioners, 10) ("Pet. Br."). According to petitioners, "the Act is intentional in design in prohibiting exceptions to the filed rate doctrine". (*Id.* at 12).

These arguments seriously misapprehend the statutory provisions applicable to motor carrier rates and practices. It is evident from those provisions that the doctrine requiring collection of a carrier's tariff rates does not apply when the rates, or their collection, violate other provisions of the Act. While Section 10761(a) compels a motor carrier to provide transportation pursuant to rates contained in tariffs filed with the Commission and to charge and collect only those rates, Section 10701(a) of the same statute requires that those rates and the carrier's practices be reasonable. Additionally, Section 10704(b)(1), 49

[2] "Pet.App." refers to the Appendices to the Petition for Writ of Certiorari filed in this proceeding.

[3] The *amici* supporting petitioners advance essentially the same arguments as petitioners in requesting that the decision of the court below be set aside. Their arguments, therefore, will not be addressed separately.

U.S.C. § 10704(b)(1), provides for the prescription of remedies by the ICC if it decides that a motor carrier's rates or practices are not reasonable, and Section 11705(b)(3), 49 U.S.C. § 11705(b)(3), subjects motor carriers to damages resulting from the imposition of rates the ICC finds to violate the Act.

These provisions manifestly deny a motor carrier the right to collect its filed rates when the ICC concludes that to do so would be unreasonable or otherwise unlawful. However, under petitioners' construction of the Act, the filed rate doctrine repeals the "reasonableness" sections and, in so doing, relieves carriers from any obligations thereunder. Such an interpretation is patently impermissible, without support, and contrary to basic tenets of statutory construction. To give full effect to all of the relevant and co-equal portions of the Act—as did the court below—Section 10761(a) must be viewed as only one part of a statute which, while requiring carriers to charge their filed rates, at the same time mandates that such rates, and the practices related thereto, be reasonable.[4] As the ICC explained in its decision in

[4] It is a cardinal principle of statutory construction that courts must attempt to give an act's provisions a harmonious and comprehensive meaning. *See, e.g., Richards v. United States*, 369 U.S. 1 (1962); *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1857); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987); *Beisler v. CIR*, 814 F.2d 1304 (9th Cir. 1987); *Consortium of Com. Based Organizations v. Donovan*, 530 F.Supp. 520, 528 (E.D. Cal. 1982) (citing *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)). ("It is fundamental that a court is not to read each section of a statute in isolation but, rather, should consider each section in connection with the entire statute and the objects and policies of the law as indicated by the various provisions.")

Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates, 5 I.C.C. 2d 623, 627 (1989), "Section 10761 is only part of an overall regulatory scheme; it should not be elevated over the unreasonable practices provision of § 10701." *See also, West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016, 1027 (9th Cir. 1990), *petition for reh'g filed* ("*West Coast*"); *Seaboard System R.R. Co., Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986) ("*Seaboard*").

This Court's decisions have confirmed that the plain language of the statute requires that all of the sections thereof relating to motor carrier rates and practices be given equal weight. When such equal weight is accorded, the result is a statutory scheme which creates a distinction between "legal" motor carrier rates and "lawful" rates. The "legal" rate is the rate properly published and filed with the ICC in a tariff as required by Section 10761(a); it must be charged to all shippers alike unless found to be unreasonable. A "lawful" rate is a filed rate which is reasonable or otherwise lawful as required by Section 10701(a). A legal rate, i.e., the filed rate, may at the same time be unlawful if it is declared unreasonable by the ICC. *Arizona Grocery Co. v. Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) ("*Arizona Grocery*"). The Court there explained that "the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable". 284 U.S. at 384. *See also Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, 277-278 (1892); *United States v. Illinois Cent. R. Co.*, 263 U.S. 515, 521, 525-526 (1924).

Even in *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94 (1915) ("*Maxwell*"), upon which petitioners primarily rely in claiming that defenses by shippers to collection of the filed rate are prohibited (Pet. Br. 10), the Court held that the filed rate doctrine is not inviolate and that such rate is not necessarily the "lawful" reasonable rate. Instead, a carrier must abide by it, "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. If, as *Maxwell* and *Arizona Grocery* hold, a filed rate must be reasonable in order to be lawful, a shipper obviously may assert a defense, based upon the reasonableness standards of Section 10701(a), to an attempted collection of that rate.[5] The very authority relied upon by petitioners, therefore, contains the exception to the doctrine they invoke.

That filed rates may properly be subject to remedial action by the ICC was recently reaffirmed by the Court in *I.C.C. v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("*I.C.C.*"). In that case, the Court upheld a Commission policy pursuant to which it nullified effective motor carrier tariffs on file with it if those tariffs were submitted in substantial violation of motor carrier rate bureau agreements. *Id.* at 370-371. The rates contained in those tariffs were, beyond question, filed with the ICC. Nevertheless, this Court held that, under certain conditions, they may be invalidated by that agency.

Many other courts have agreed with the court below, and have held that a shipper may assert an un-

[5] Petitioners frequently refer to the defense asserted by Primary in this case as an "equitable" one. (*See, e.g.*, Pet. Br. 10). On the contrary, the defense is expressly authorized by Section 10701(a) and the other provisions of the Act discussed herein.

reasonableness defense to the attempted collection of a filed rate. Those courts have confirmed that the raising of such defense under Section 10701(a) is not precluded by the filed rate doctrine. *See, e.g., Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475, 481-482 (7th Cir. 1989) ("*Carriers Traffic Service*"); *Delta Traffic Service, Inc. v. Appco Paper & Plastics Corporation*, 893 F.2d 472, 475 (2nd Cir. 1990) ("*Delta Traffic Service*") (referral to the ICC of defense of unreasonableness of carrier's practices does not undermine the filed rate doctrine); *Seaboard, supra*, 794 F.2d at 637-638; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) ("[M]erely because the carrier is bound to charge the filed rate, it does not follow that he is entitled to keep it"); *Western Electric Co., Inc. v. Burlington Truck Lines, Inc.*, 501 F.2d 928 (8th Cir. 1974); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982) ("*Western*") (the ICC has primary jurisdiction to determine whether a "legal" rate is in fact the "lawful" rate); *West Coast, supra*, 893 F.2d at 1027 ("Because the ICC's policy harmonizes the filed rate doctrine with the statutory proscription of unreasonable practices, we hold that the ICC's consideration of unreasonable practices defenses to undercharge actions is consistent with congressional intent.") The fact that a motor carrier rate is published in a tariff on file with the Commission as required by Section 10761(a) does not, therefore, forever establish its lawfulness. Instead, the rate itself or the practices surrounding its collection may be challenged as unreasonable under other sections of the Act of equal stature.[6]

Petitioners' authority fails to support their position that filed rates may never be invalidated. The decision in *Square D Company v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), like *Maxwell, supra*, does not hold that filed rates must be collected under all circumstances. Instead, the Court held that shippers had no remedy under the antitrust laws for treble damages based upon such rates. The decision does not say that the same shippers may not assert an unreasonableness defense to the attempted collection of a motor carrier's filed rate, nor does it hold that such rate could not be found by the ICC to violate Section 10701(a). On the contrary, the decision expressly acknowledges that filed rates, while not vulnerable to a private antitrust challenge, may nevertheless be declared invalid by the Commission. The Court thus held, quoting from *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922) ("*Keogh*"), that the tariff rate is the legal rate ' "[u]nless and until suspended or set aside [by the ICC]. . . . " ' 476 U.S. at 416. The Court added, again quoting from *Keogh*, ' "[w]hat rates are legal is determined by the Act to Regulate Commerce" '. *Id.* at 416, n. 18. In

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[6] *Maxwell* and *Arizona Grocery, supra*, involved the reasonableness of a carrier's rates rather than its practices. However, neither case held that collection of a filed rate could not be resisted on the ground that such collection would be unreasonable. In any event, as seen from the authority discussed at page 10, *supra*, there is no basis for concluding that an ICC finding of unreasonableness as to one element of Section 10701(a) precludes collection of the filed rate, but that a finding as to the other element does not, when the same reasonableness standard of the same provision of the Act applies to both.

short, *Square D*, *Keogh*, *Maxwell*, and *Arizona Grocery* all acknowledge that filed rates can be held to be unreasonable, and thereby recognize that Sections 10701(a) and 10761(a) are co-equal provisions of the Act.[7]

The claim that the rates here involved were not found to be unreasonable and, thus, are "the duly submitted lawful rates", (Pet. Br. 11), again fails to appreciate the interrelationship between the filed rate doctrine and the concurrent statutory requirement that rates and practices be reasonable. The ICC found that the imposition of Quinn's filed rates would, under all the circumstances, be an unreasonable practice in violation of the Act. Because of its commission of a statutory violation, the ICC concluded that Quinn should not be permitted to collect its undercharges based on the filed rate. Since Section 10701(a) provides that the rates and practices of motor carriers must be reasonable, an ICC determination that collection of a filed rate is unreasonable, in response to a shipper's defense thereto, precludes such collection—under the statute and the judicial precedent discussed herein.[8]

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[7] In addition, none of the cases cited by petitioners at pages 10-11 of their brief involved the issue of a shipper's defense to an undercharge claim, nor do those cases remotely support petitioners' position that the ICC lacks authority to prohibit the collection of filed rates.

[8] Application of the ICC's Section 10701(a) authority to bar the collection of unreasonable undercharges has not resulted in a discarding of the filed rate requirement (Pet. Br. 11-12)—carriers must still publish their rates in tariffs, file them with the ICC, and charge the rates contained therein. Because the filed rate requirement still exists, no statutory requirements have been rendered "unreasonable and unnecessary". (*Id.*)

The decision below gives effect to all of the Act's relevant provisions and concludes therefrom that a carrier's "legal" filed rate may not be collected if such collection would violate the Act. This action resolves, in a rational manner, the tension that exists between the filed rate section of the statute, on the one hand, and, on the other, those parts of the Act mandating that rates and practices be reasonable. This is not judicial or regulatory action of a particularly radical or sinister nature. It is supported by unambiguous statutory language and judicial precedent, and is grounded upon the most basic elements of fair dealing; if a carrier's charges or business conduct relating thereto are unlawful, it should not be allowed to profit by retaining those charges.

Petitioners, on the other hand, are attempting, without any justification whatsoever, to employ Section 10761(a) in a manner that Congress never intended. As the court below explains, 879 F.2d at 404, the filed rate requirement was enacted to protect shippers from rate discrimination; strict adherence to public tariffs by carriers would ensure that a shipper was charged the same rate by its carriers as other shippers. In this case, however, petitioners are requesting that this Court permit the filed rate doctrine to be used, not as a shield to protect the shipping public, but as a bludgeon to force them to pay rates the ICC has found may not be lawfully collected. This perversion of the filed rate requirement is permitted neither by the statute, by the decisions of this Court, nor by any notions of fairness or justice.

B. The ICC Has Exclusive Power To Decide Whether A Motor Carrier's Unreasonable Practices Prevent The Collection Of Its Filed Rates

Not only may a motor carrier be precluded from collecting its filed rate under certain circumstances, but the authority to make the determination as to whether such rate or its attempted assessment is unreasonable, is vested exclusively in the ICC. Petitioners allege, on the contrary, that the ICC had no authority to decide Primary's unreasonableness defense; accordingly, referral of that defense to the agency circumvented the filed rate doctrine. (Pet. Br. 12). This argument again misconstrues the ICC's plenary and exclusive statutory authority over motor carrier rates and practices, and the function it performs in deciding whether such rates and practices are reasonable.

Petitioners attach some significance to the fact that the Act assigns different roles to the Commission depending upon whether a rail or motor carrier proceeding is involved; from this, they claim that it has no jurisdiction to bar the collection of filed motor carrier rates. (Pet. Br. 17-18). This is incorrect; the differences in the ICC's handling of motor and rail cases are procedural only. For example, if a rail rate is at issue, a shipper may file a complaint directly with the Commission. The ICC is empowered to enter an award of reparations on the basis of the complaint; no concurrent pending court action is necessary. 49 U.S.C. §§ 11705(b)(2) and 11706(c)(1).

In a case involving motor carrier rates and practices, however, the claim is filed in a federal district court, not before the ICC. 49 U.S.C. §§ 11705(b)(3) and 11706(c)(2). But the court can only enter an order

after the issue has been referred to the Commission, pursuant to the doctrine of primary jurisdiction,[9] and that agency has decided the lawfulness of the challenged rate or practice under Section 10701(a). The authority of the ICC, and not a court, to decide such issues is conferred on it by Sections 10701(a) and 10704(b)(1), which give it exclusive jurisdiction to decide reasonableness issues, and by Section 11705(b)(3) which provides that motor carriers are liable for damages resulting "from the imposition of rates . . . the Commission finds to be in violation" of the Act. This means that a motor carrier is liable for the imposition of filed rates which violate the Act only if the ICC, and not a court, so concludes.

Accordingly, the ICC plays the exclusive role in deciding the reasonableness of a motor carrier's filed rates and practices relating to past shipments when such reasonableness is raised by a shipper in a court action. That its decisions may only be implemented by a court does not diminish in any respect the ICC's plenary and exclusive statutory authority to decide such issues.[10] An ICC finding of unreasonableness is binding on the carrier unless such determination is set aside by the referring court. *Interstate Commerce*

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[9] *See, e.g., United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956) ("*Western Pacific*"); *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) ("*Great Northern*"); *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) ("*Hewitt-Robins*"); *Seaboard, supra*, 794 F.2d at 638; *Western, supra*, 682 F.2d at 1231.

[10] An agency need not have power to provide the ultimate relief sought in the court action in order to decide issues entrusted to it by the statute. *Hewitt-Robins, supra*, 371 U.S. at 89.

Commission v. Atlantic Coast Line R.R., 383 U.S. 576 (1966); *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202, 205 (1960); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946); *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934); *I.C.C. v. Union Pacific R.R. Co.*, 222 U.S. 541, 547 (1912); *Locust Cartage Co. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 341 (1st Cir. 1970).

As the Commission stated in *Informal Procedure For Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 413 (1969) "Congress . . . establish[ed] a judicial reference procedure for recovery of reparations by shippers by specifically providing that before a court can award reparations the Commission must determine the extent that the rate or rates in issue 'have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.' " *See also United States v. Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974) ("*Associated Transport*"); *National Motor Freight Traffic Ass'n. v. United States*, 268 F.Supp. 90, 92 (D.D.C. 1967), *aff'd. per curiam*, 393 U.S. 18 (1968) ("*National Motor Freight*").

Numerous courts have confirmed the ICC's exclusive statutory authority to prohibit the collection of a motor carrier's filed rates because of the carrier's past unreasonable practices. *See, e.g., Delta Traffic Service, supra*, 893 F.2d at 474; *Seaboard, supra*, 794 F.2d at 638; *West Coast, supra*, 893 F.2d at 1027; *Carriers Traffic Service, supra*, 881 F.2d at 481, 485 ("for a number of years, the ICC has exercised its 'unreasonable practice' jurisdiction to declare application of filed rates unreasonable") ("we . . . uphold the ICC's exercise of its 'unreasonable practice' jurisdiction to invalidate the retroactive application of a higher tariff rate"). Other courts have recognized the discretion of the ICC, in regulating the motor carrier industry, to declare practices unreasonable under other sections of the Act, such as Section 11701(a), which provides that if the ICC finds that a carrier is violating the Act, it "shall take appropriate actions to compel compliance" therewith. *See e.g., Western, supra*, 682 F.2d at 1231, 1232 (Only ICC has statutory authority to decide unreasonableness defense to motor carrier undercharge claim).

Even apart from the statute and the decisions thereunder establishing the ICC's authority to bar the collection of filed rates on the basis of a motor carrier's past practices, this Court has held that the Commission has the exclusive and independent power to decide if a motor carrier's past rate-related practices are unreasonable. In *Hewitt-Robins, supra*, the Court decided that a shipper's claim for damages for unreasonable routing practices by a motor carrier was within the ICC's primary jurisdiction. 371 U.S. at 87. The shipper's challenge was directed not at the reasonableness of the carrier's rates, but at its misrouting practices. *Id.* The Court found that "[t]he practice of the Commission in making such determination [as to motor carrier practices] in the first instance, *even though it has no power to award reparations in a given case*, has long been exercised . . . " 371 U.S. at 89. (Emphasis supplied).

It is therefore clear that not only does the Commission possess exclusive authority under the Act to award "reparations" for past unreasonable motor car-

rier practices, but even in the absence of such statutory power, it may do so under *Hewitt-Robins*.[11] *See also Northern Pacific Ry. v. Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires . . . preliminary determination of administrative questions by the Commission applies . . . to any practice of the carrier which gives rise to the application of a rate"); *Great Northern*, *supra*, 259 U.S. at 291.

Petitioners argue, however, that the decision of the court below that the filed rates could not be collected created a remedy for the shipper "where none independently exists in either the courts or the ICC." (Pet. Br. 13, 16). If by "independent" authority petitioners mean "sole" authority, they are correct only to the extent that complaints involving motor carrier rates and practices must, as discussed, be filed initially with a court; but the decision on the merits as to the lawfulness of the rates and practices is rendered by the ICC. Pursuant to Sections 10701(a) and 11705(b)(3), the ICC—and not a court—can waive the collection of past rates, with such order then enforced by the courts. That the remedy may not be granted by the ICC "independently" is irrelevant. Such independence is not required by the Act; instead, a joint procedure is specifically prescribed.[12]

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[11] *Hewitt-Robins*, therefore, provides no assistance to petitioners. (Pet. Br. 18-19). Even assuming the ICC has no statutory authority to decide the reasonableness of past motor carrier practices (an unfounded assumption), such jurisdiction is in any event conferred by that decision, which recognizes the ICC's exclusive and plenary powers over motor carrier practices.

[12] In contending that the court of appeals erred in relying upon the decision in *Seaboard*, *supra* (Pet. Br. 16-18), petitioners again claim that the difference between the ICC's powers over rail rates and practices, on the one hand, and motor rates and practices, on the other, invalidates the ICC's action in this case. However, as discussed, despite the differences in procedure, the ICC has exclusive jurisdiction to decide motor carrier cases. The fact that a shipper's complaint in such cases is filed with a court pursuant to Section 11706(c)(2) of the Act instead of directly with the ICC is of no substantive significance and does not, as petitioners claim, vest exclusive jurisdiction in the court. (Pet. Br. 17).

The authority relied upon by petitioners in support of their contention that the ICC has no independent power to bar the collection of filed rates, is inapposite. (Pet. Br. 13-16). In both *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), the involved agency had no authority to provide the relief sought. In *Montana-Dakota*, a utility company filed suit in federal court seeking reparations for unreasonable electric rates. The Court concluded that since the Federal Power Commission had no power to grant reparations, 341 U.S. at 254, 258, and since a district court cannot decide the reasonableness of a rate, *Id.* at 251-252, the complaint failed to state a cause of action. As shown herein, the ICC has authority, under the statute and the decisions of this Court, to decide the lawfulness of past motor carrier rates and practices.

The decision in *T.I.M.E.* concluded that the 1935 Motor Carrier Act did not provide a cause of action to shippers for the recovery of past unreasonable rates, nor did it permit them to assert unreasonableness as a defense to undercharge suits. 359 U.S. at 470. Correct as this decision may have been in 1959, it was overruled in 1965 when Congress enacted leg-

islation, now codified as Section 11705(b)(3),[13] providing a statutory reparations remedy in the ICC. That legislation, along with the ICC's reasonableness jurisdiction and the *Hewitt-Robins* decision, empowers the ICC to grant the relief it provided in this case.[14]

Petitioners further claim that the legislative history of the 1965 amendments to the Act supports their position that the ICC may not order the waiver of filed rates because of a carrier's past practices. (Pet. Br. 18-24). The short answer to this contention is that, in light of the plain statutory language, the legislative history is irrelevant. Sections 10701(a) and 11705(b)(3) provide for the waiver of filed rates by the ICC; accordingly, they authorized the Commission's action in this case. The ICC decided that it would be an unreasonable practice in violation of Section 10701(a) for Quinn to collect its filed rates from Primary—rather than the lower negotiated rates—for certain past shipments. The Commission reviewed Quinn's practices under the standards of its exclusive reasonableness jurisdiction and concluded that such practices, which included the attempted collection of its filed rates, were unreasonable and barred such

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[13] Pub. L. No. 89-170, 79 Stat. 651-652.

[14] Petitioners allege (Pet. Br. 14-15), that Section 10701(a) does not afford shippers "a cause of action or defense" for a carrier's violation of that Section. They fail, however, to go the next step. Both Section 11705(b)(3) and the decision in *Hewitt-Robins*, *supra*, afford such remedy in conjunction with a finding by the ICC that imposition of a motor carrier rate violates Section 10701(a). Similarly, petitioners' argument that there is no common law right to a reasonable rate (Pet. Br. 15-16) is immaterial. The ICC's decision below was founded on its statutory authority over unreasonable motor carrier practices.

collection. The ICC's decision constituted a finding as to the lawfulness of both Quinn's rates and practices; it sustained Primary's claim that the negotiated rates—and not the filed rates—were the maximum lawful and reasonable rates it should be required to pay.

Section 11705(b)(3) authorizes the ICC to award damages for the imposition of rates it finds to be in violation of the Act. Contrary to petitioners' claim (Pet. Br. 23-24), the relief is not limited to those rates which are unreasonable; instead, it encompasses the imposition of rates the ICC "finds to be in violation of" any provision of the statute. This statutory language embraces the ICC's finding that Quinn's collection of the filed rates would be an unreasonable practice under Section 10701(a). In other words, the Commission concluded, in the language of Section 11705(b)(3), that it would violate the Act for the filed rates to be imposed on the shipper's traffic. Its decision barring the collection of those rates is, therefore, a decision the ICC is empowered under Section 11705(b)(3) to make.[15]

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[15] The very legislative history of the 1965 amendments to the Act upon which petitioners rely, which amended former Section 204a and is now codified as Section 11705(b)(3), confirms the ICC's statutory authority to bar the collection of filed rates because of the unreasonableness of past motor carrier practices. The House Report's summary states that:

> [The act] would permit a court of competent jurisdiction to award reparations to persons *injured through violations of the Interstate Commerce Act by motor carriers*. . . . This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to

Petitioners' final statutory argument is that Section 204a of the Act, the pertinent provisions of which are recodified in Section 11705(b)(3), limited actions against motor carriers to "reparations" and that no changes in this limitation were made by the Act's 1978 recodification. (Pet. Br. 19-20, n. 11). But the reparations definition contained in the prior statute was not limited to recovery for unreasonable rates; instead, it provided for reparations for charges found by the ICC to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or prejudicial. Former Section 204a(2) and (5).

While the statutory language provides ample authority for the decision of the court below, it is, in any event, well-settled that the ICC has broad discretion to fashion appropriate remedies, not specifically set forth in the statute, for violations of the Act. For example, in *I.C.C.*, *supra*, 467 U.S. at 364-365, this Court held that the ICC's authority is not bounded by the powers enumerated in the Act; instead it has discretion to take actions that are legitimate, reasonable, and directly adjunct to its statutory power. The Court added that: "Congress has expressly provided that powers enumerated in the Interstate Commerce Act do not preclude the Commission from taking other actions consistent with its statutory duties. § 10321(a)". *Id.* at 359, n. 3. *See*

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aid the court by making necessary administrative determinations relating to the amount of reparations.

H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). (Emphasis supplied). Accordingly, the ICC, in tandem with the referring court, is empowered to grant relief for past "violations" of the Act by motor carriers, which includes unreasonable practices, and not just for past unreasonable rates.

also, Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 352 (1982) ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper"). The ICC has, accordingly, both explicit and implicit authority to fashion the remedies it deems appropriate for violations of the Act it administers. At a minimum, its action here is a reasonable adjunct to its statutory power to ensure the reasonableness of both motor carrier rates and practices.

In an "extra-statutory" contention, petitioners claim that Primary's defense was asserted "outside of . . . the Act" (Pet. Br. 24). Primary's defenses to the carrier's lawsuit were firmly grounded in specific provisions of the Act, including Section 10701(a), and the decision of the court below was based on those provisions. A shipper's claim to a rate other than a filed rate is not an "extra-statutory" claim; it is based on the statute, which empowers the ICC to decide it.

Petitioners finally attack the finding of the court below that the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 ("1980 Act"), supports the ICC's decision. (Pet. Br. 26-31). Petitioners assert that since the 1980 Act did not alter the filed rate requirement, that legislation provides no basis for the ICC's action. First, as discussed, the ICC in this case has in no way modified the filed rate doctrine; carriers are still required to publish their rates in tariffs, to file those tariffs with the ICC, and to charge only their tariff rates. Nor does the court below suggest that the ICC has engaged in such modification—pursuant to the 1980 Act or anything else. The ICC has, instead, allowed shippers to assert their statutory defenses to the attempted collection of filed rates.

Second, wholly apart and independent from the 1980 Act, the short answer to petitioners is that the ICC has the statutory authority to decide the issues involved in this case. And as the court below recognized, 879 F.2d at 406, the ICC's re-evaluation of its regulatory policy concerning negotiated rates cases was based upon that statutory authority over unreasonable practices, and was undertaken with the clear realization that it must be conducted within the requirements of the filed rate doctrine. While the 1980 Act may have prompted the ICC's re-evaluation, the statutory basis therefor was already firmly in place.

In sum, the plain language of the relevant portions of the Act, its legislative history, and this Court's decision in *Hewitt-Robins*, *supra*, authorize the ICC to declare the collection of a filed rate unreasonable. Petitioners' crabbed interpretation of that authority is not supported.

C. The Court Below Properly Concluded That, In View Of Its Exclusive Jurisdiction To Decide Them, The Reasonableness Issues Here Presented Were Required To Be Referred To The ICC

The ICC's exclusive authority to decide the reasonableness of motor carrier rates and practices requires that, when such an issue is raised in a proceeding involving the collection of a motor carrier's filed rate, the proceeding must be stayed and the issue referred to the ICC. Because of this exclusive jurisdiction over such issues, this Court has consistently recognized that the Commission alone is empowered to decide them.[16] For example, in *Texas*

[16] Because of the ICC's exclusive jurisdiction to decide the issues here presented, referral of those issues to it was not a "procedural improvisation" (Pet. Br. 12)—it was a procedural requirement.

& P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907), the Court stated:

> "[An action] predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable . . . "

And as Justice Brandeis said in *Great Northern*, *supra*, 259 U.S. at 291 (1922): "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission".

The Court held in *Western Pacific*, *supra*, 352 U.S. 59, that where a defense of unreasonableness is raised by a shipper in a suit by a carrier to recover undercharges, a court has no jurisdiction to decide that defense; instead, it must refer the matter to the ICC for an initial determination just as if the issue had been raised in a reparations action by the shipper. The Court explained that the doctrine of primary jurisdiction:

> "[A]pplies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special

> competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Id. at 63-64. Specifically with respect to an issue as to the reasonableness of a tariff, the Court noted that such issue is "recognized by all to be one for the Interstate Commerce Commission". *Id.* at 68.[17] And, quoting from the decision in *Union Pacific R. Co. v. United States*, 111 F.Supp. 266 (Ct. Cl. 1953), the Court observed that: "[T]he question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission." *Id.* at 69, n. 10. More recently, in *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 325 (1981), the Court again stated that: "The judgment as to what constitutes reasonableness belongs exclusively to the [Interstate Commerce] Commission." In *Hewitt-Robins, supra*, the Court confirmed that the ICC's primary jurisdiction extends not only to the issue of the reasonableness of a carrier's rates, but also to issues as to the reasonableness of its rate-related practices. 371 U.S. at 88.

Other courts have similarly held that the ICC must, in the first instance, decide whether the practices engaged in by carriers subject to its jurisdiction pass muster under the Act. For example, the United States Court of Appeals for the 8th Circuit has held that:

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[17] When Congress amended Part II of the Act in 1965 to permit shippers to recover for past unreasonable motor carrier charges, it recognized the need for the referral to the ICC of such cases. (The ICC "would be called upon to aid the court by making necessary administrative determinations.") H.R. Rep. No. 253, 89th Cong. 1st Sess., pp. 12, 13 (1965).

"The doctrine of primary jurisdiction requires the court to refer the matter to the ICC when, as here, the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice . . . . " *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255, 260-261 (1982) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940)). "[T]he court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practice under the terms of the Act . . . " And in *Western, supra*, 682 F.2d at 1232, the court of appeals reversed a district court decision that a tariff notation was unreasonable, since "[O]nly the ICC can do that . . . "[18]

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[18] *See also Baltimore & Ohio Railroad v. United States*, 305 U.S. 507 (1939); *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-580 (1966); *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation District*, 304 U.S. 295, 301 (1938); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952); *Pennsylvania R. Co. v. Clark Brothers Coal Mining Co.*, 238 U.S. 456, 469 (1915); *In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3rd Cir. 1973), *cert. denied*, 414 U.S. 923 (1973); *Chicago R.I. & P.R. Co. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385, 386-389 (8th Cir. 1970); *Middlewest Motor Freight Bureau v. U.S.*, 433 F.2d 212, 222 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *Seaboard, supra*, 794 F.2d at 638 ("finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission."); *Hansen v. Norfolk & W. Ry. Co.*, 689 F.2d 707 (7th Cir. 1982); *Associated Transport, supra*, 505 F.2d at 369; *United States v. United States Steel Corp.*, 645 F.2d 1285, 1291 (8th Cir. 1981); *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546, 548 (8th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3412 (U.S. Dec. 14, 1989) (No. 89-936); *West Coast, supra*, 893 F.2d 1016; *Delta Traffic, supra*, 893 F.2d 472; *National Motor Freight, supra*, 268 F. Supp. at 92. But see,

The ICC possesses exclusive authority to address the question of what rate may be charged by a carrier. Hence, if a motor carrier brings an action for undercharges and the shipper asserts the defense that collection of the undercharges would be an unreasonable practice in violation of the Act, the court case must be stayed and the matter referred to the ICC. The court below correctly concluded that, under well-settled principles of primary jurisdiction, the unreasonable practice issue involved in this case was required to be referred to the Commission for its determination.

CONCLUSION

For the foregoing reasons, the ICC's decision in this case was a proper exercise of the authority conferred upon it by the Act and by the decisions of this Court. Accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

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